

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 - Regulation of Health and Adult Social Care Services

Chapter 2 – Competition

Section 72 - Functions under the Competition Act 1998

705. This section provides Monitor with concurrent functions with the OFT under Part 1 of the 1998 Act in relation to the provision of health care services in England.
706. Chapter 1 of Part 1 of the 1998 Act prohibits undertakings from reaching certain agreements and decisions and carrying out concerted practices that prevent, restrict or distort competition. For example, it may prohibit organisations from reaching agreements to limit patient choice or apportioning healthcare markets, except where an exemption or exclusion applies. However, it permits beneficial co-operation, for example where the benefits to patients outweigh any disadvantages, in the form of agreements which contribute to improving the production or distribution of goods and services or promoting technical or economic progress, while allowing consumers (i.e. patients) a fair share of the resulting benefit, and which do not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
707. Chapter 2 of Part 1 of the 1998 Act prohibits undertakings from abusing a dominant position in a market. For example, it prohibits organisations with a dominant position from: imposing unfair trading conditions; limiting production, markets or technical development to the prejudice of consumers (i.e. patients); applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or making the conclusion of contracts subject to supplementary obligations unrelated to the contract.
708. Since 2004 the UK has been required to apply EU competition law when applying national competition law. The prohibitions under Chapter 1 and Chapter 2 of the 1998 Act are modelled on Articles 101 and 102 of the Treaty on the Functioning of the European Union, which prohibit agreements that prevent, restrict or distort competition, and prohibit abuse of a dominant position.
709. The 1998 Act is generally applied and enforced by the OFT. The OFT is currently responsible for applying and enforcing the Act in relation to health care services.
710. Under the Act, Monitor has concurrent powers with the OFT to conduct investigations where it has reasonable grounds for suspecting that the prohibitions – under either UK or EU law – have been infringed in the provision of health care services in England.
711. Using the concurrent powers, Monitor can also provide remedies for breaches of the prohibitions. It can issue directions to undertakings to bring an infringement to an end

*These notes refer to the Health and Social Care Act 2012
(c.7) which received Royal Assent on 27 March 2012*

and issue fines. For example, Monitor might direct an undertaking to change its conduct, such as ceasing an arrangement that restricted the ability of commissioners to redesign components of services and thereby restricted competition to the detriment of patients and taxpayers. Any revenue from fines would be paid into the consolidated fund.

712. There are some functions of the OFT under the 1998 Act which Monitor does not share. For example, the OFT is responsible for issuing guidance on appropriate levels of penalties for infringements of the prohibitions in the 1998 Act and for making procedural rules to be followed under that Act. Monitor cannot exercise these functions, because the OFT is responsible for issuing this type of guidance and making regulations on the application of the 1998 Act for the economy as a whole. This arrangement is designed to secure consistent application of that Act. However, Monitor is still required to issue advice and information about the application and enforcement of the 1998 Act in relation to health care services.